

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BETTY KITTERMAN)	
Claimant)	
)	
VS.)	
)	
DANA ENGINE CONTROLS)	
Respondent)	Docket No. 1,005,945
)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the March 8, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Jon L. Frobish.

ISSUES

The ALJ concluded claimant was entitled to temporary total disability benefits for the period commencing November 12, 2003 "and continuing until she is released to substantial and gainful employment."¹

The respondent requests review of this decision alleging the ALJ exceeded his jurisdiction in awarding temporary total disability benefits under the attendant facts and circumstances. Respondent contends the claimant has failed to undergo the surgical procedure recommended by Dr. John Yost, the court-appointed examiner, and instead, elected to retire from her job with respondent. Thus, even though Dr. Yost has recommended that claimant not work until such time as surgery can be performed, respondent contends the ALJ's decision to award her temporary total disability benefits leaves it with no effective remedy, and serves to discourage claimant from pushing forward with her claim.

Claimant argues the ALJ's Order should be affirmed in all respects. Claimant maintains she is willing to have the recommended surgery but, through no fault of her own, the surgery has yet to be scheduled. In the meantime, Dr. Yost took her off work as of November 12, 2003. Her earlier decision to retire from her job for respondent should not disqualify her from receiving temporary total disability benefits.

¹ ALJ Order (March 8, 2004) at 1.

The sole issue is whether the ALJ exceeded his jurisdiction in awarding temporary total disability benefits for the period November 12, 2003 forward, until such time as claimant is released to any substantial gainful employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) affirms the ALJ's determination that claimant is entitled to temporary total disability benefits.

An Administrative Law Judge's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the Administrative Law Judge exceeded his or her jurisdiction in granting the preliminary hearing benefits.² "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."³

In this instance, respondent alleges the ALJ exceeded his jurisdiction in awarding temporary total disability benefits. Thus, the Board has jurisdiction to consider this appeal for the sole purpose of determining whether the ALJ exceeded his jurisdiction. Whether temporary total disability benefits is appropriate rests within the ALJ's discretion and is not subject to review at this stage of the litigation.⁴

While neither party disputes the underlying compensability of claimant's claim, respondent has denied responsibility for the knee replacement procedure recommended by the treating physician. As a result of this dispute, a court-appointed neutral physician, Dr. John Yost, was appointed. Following a preliminary hearing, the ALJ directed respondent to provide the recommended treatment if Dr. Yost concluded the need for the treatment was causally related to her underlying work-related accident.

Consistent with the preliminary hearing Order, Dr. Yost examined claimant and recommended claimant's right knee be replaced. He further determined she should refrain from working as of November 12, 2003, and that surgery should be done immediately. It is unclear from the record precisely why the surgery was not scheduled, although it appears not to have been due to any misconduct on the part of either claimant or respondent. As of the date of the preliminary hearing on February 19, 2004, surgery had yet to be scheduled.

The focus of this appeal is on Dr. Yost's decision to take claimant off work on November 12, 2003 for the purpose of knee replacement surgery. After her initial treatment following her accident, claimant returned to work for respondent in February of 2002. She

² K.S.A. 44-551(b)(2)(A)(Furse 2000).

³ K.S.A. 44-534a(a)(2)(Furse 2000).

⁴ K.S.A. 44-551(b)(2)(A)(Furse 2000).

continued to work uneventfully until August 9, 2002. At that point, she voluntarily accepted early retirement. She receives a monthly pension and social security payments. Other than the surgical recommendation made on November 12, 2003, claimant has received no further treatment for her injury.

Respondent has a two-fold objection to the ALJ's decision to award temporary total disability benefits. First, claimant has not received any ongoing treatment since she last saw Dr. Yost. She has voluntarily removed herself from the workforce and is not actively pursuing the treatment recommended to her. Accordingly, respondent maintains this case is ripe for a decision and should not be allowed to linger on the ALJ's docket. Second, the delay in scheduling surgery only serves to discourage claimant from timely following up on the court-appointed physician's treatment recommendations. Respondent's objection is understandable. As long as claimant does not have the surgery, she continues to receive weekly compensation benefits along with her monthly pension and social security benefits.

The Board has considered the parties' arguments and finds the ALJ did not exceed his jurisdiction in awarding temporary total disability benefits. While it is unfortunate that the knee replacement surgery claimant is to have undergone has yet to be scheduled, the delay appears to be through no concerted effort on her part. Respondent is charged with the responsibility for ensuring the necessary treatment is provided as required by the ALJ's preliminary hearing Order. The payment of weekly benefits since November 12, 2003, is not in violation of any provisions of the Workers Compensation Act, K.S.A.44-501 et seq., nor did the ALJ exceed his jurisdiction in awarding such benefits. Accordingly, the respondent's appeal is dismissed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.⁵

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated March 8, 2004, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of May, 2004.

BOARD MEMBER

c: William Phalen, Attorney for Claimant
Garry Lassman, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁵ K.S.A. 44-534a(a)(2).